

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF &
APPENDIX**

76-1474

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 76-1514

B
P/S

UNITED STATES OF AMERICA,
Plaintiff - Appellee

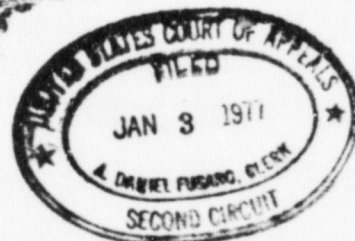
v.

ANDREW LUPO,
Defendant - Appellant.

~~APPENDIX~~
BRIEF FOR APPELLANT

MICHAEL GRAHAM
487 Main Street
Hartford, Connecticut 06103
(203) 522-8631

Attorney for Appellant



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TABLE OF CONTENTS

	<u>Page</u>
TABLE OF CASES AND AUTHORITIES.	ii
STATEMENT OF QUESTION PRESENTED	1
STATEMENT OF THE CASE	2
ARGUMENT	3
I. THE CURRENT WAGERING TAX PROVISIONS OF THE INTERNAL REVENUE CODE, 26 U.S.C. 4401 ET SEQ VIOLATE APPELLANT'S FIFTH AMENDMENT PRIVILEGE AGAINST SELF INCRIMINATION.	3
A. Statutory revisions to the Internal Revenue Code enacted following the ruling in <u>Marchetti v United States</u> , 390 U.S. 39 (1968) and <u>Grosso v United States</u> , 390 U.S. 62 (1968) are not coextensive with the Fifth Amendment privilege against self incrimination.	3
B. There is a real and appreciable risk of self incrimination in complying with the wagering tax provisions of the Internal Revenue Code notwithstanding the provisions of 26 U.S.C. §4424.	6
C. Factors other than those contemplated by 26 U.S.C. §4424 create a real and appreciable risk of self incrimination.	8
CONCLUSION	8

TABLE OF CASES AND AUTHORITIES

<u>Cases</u>	<u>Page</u>
<u>de Antonio v Solomon</u> , 42 F.R.D. 320 (D.Mass, 1973)	7
<u>Grosso v United States</u> , 390 U.S. 62 (1968)	3
<u>Marchetti v United States</u> , 390 U.S. 39 (1968)	3
<u>Minor v United States</u> , 396 U.S. 87 (1969)	7
<u>United States v O'Brien</u> , Memorandum of Decision, Sept. 29, 1976 (D.Conn)	5
 <u>Statutes</u>	
26 U.S.C. §4401	1
26 U.S.C. §4411	2
26 U.S.C. §4421	2
26 U.S.C. §4424	5
26 U.S.C. §6107	4
26 U.S.C. §6806	4
26 U.S.C. §7262	3
26 U.S.C. §7701	6
Pub. L. No.90-618, Title II. §204, 82 Stat. 1235	4
Pub. L. No.90-618, Title II. §203 (a), 82 Stat. 1235	4
 <u>Treatises</u>	
McCormick, <u>Evidence</u> (2d Ed. E. Cleary, 1972)	6
Wright and Miller, 8 Federal Practice and Procedure (1970)	6

QUESTION PRESENTED

Whether current wagering tax provisions of the Internal Revenue Code, 26 U.S.C. 4401 et seq violate the Fifth Amendment privilege against self incrimination.

STATEMENT OF THE CASE

Appellant was charged by information with failing to register with the Internal Revenue Service and pay a special occupational tax on wagering in violation of 26 U.S.C. §§4401, 4411, 4421 (1) and (2) and 7262. In the United States District Court for the District of Connecticut appellant moved to dismiss the information against him on the grounds that to comply with the statutes would violate his Fifth Amendment privilege against self incrimination.

Appellant's Motion to Dismiss was denied, his rights to appeal preserved and he entered a plea of nolo contendere on October 13, 1976. On that date the Court entered a finding of guilty and imposed the penalty of a one thousand dollar (\$1000.00) committed fine execution on payment of fine stayed pending appeal.

The single issue for appeal is that raised in appellant's Motion to Dismiss.

Appellant's case on appeal has been ordered consolidated for appeal, after motion by the government, with a number of other cases presenting the same issue of law.

ARGUMENT

I. THE CURRENT WAGERING TAX PROVISIONS OF THE INTERNAL REVENUE CODE, 26 U.S.C. 4401 ET SEQ VIOLATE APPELLANT'S FIFTH AMENDMENT PRIVILEGE AGAINST SELF INCRIMINATION.

A.

Statutory revisions to the Internal Revenue Code enacted following the rulings in Marchetti v United States, 390 U.S. 39 (1968) and Grosso v United States, 390 U.S. 62 (1968) are not coextensive with the Fifth Amendment privilege against self incrimination.

The appellant was convicted of failing to register with the Internal Revenue Service and pay a special occupational tax on wagering in violation of the statutory scheme of 26 U.S.C. §§4401, 4421 (1) and (2) and 7262.

The statutes in question in this case are the revisions of prior law declared unconstitutional by the United States Supreme Court in Marchetti v United States, 390 U.S. 39, 88 S.Ct. 676, 19 L. Ed 2d 889 (1968) and Grosso v United States, 390 U.S. 62.

The salient features of the Marchetti and Grosso opinions were that to comply with the provisions of 26 U.S.C. 4411 and 4401 would likely be violations of a person's privilege against self incrimination protected by the Fifth Amendment.

The statutes were amended following the Marchetti decision. However congress did not substantially alter the statutes to cure the Fifth Amendment question. The same pre-registration of activity which is unlawful under most state law is required in Section 4411.

The Supreme Court in Marchetti and Grosso cite sections of the Code which call for publication of the names of persons registering pursuant to §4411 (26 U.S.C. 6107); or publicly displaying the revenue stamp 26 U.S.C. 6806 (c); or that the Court gave notice to the I.R.S. "makes available to law enforcement agencies the names and addresses of those who have paid the wagering taxes", Marchetti, 390 U.S. 48. However, the Court did not rely on those peripheral circumstances in declaring the pre-registration provision unconstitutional. It was the act of pre-registration itself that was found to violate Fifth Amendment standards. This is evident in the Court's refusal to accept the government's proposal that the statutes in question be held constitutional and that the Court impose restrictions on dissemination of information, Marchetti, 390 U.S. at 58.

The Marchetti opinion goes on to state that it is the duty of congress to provide some "other protection" which "is so broad as to have the same extent in scope and effect" as the Fifth Amendment privilege against self-incrimination, Marchetti, 390 U.S. at 58.

The Congress has responded to the rule in Marchetti and Grosso by repealing the tax stamp display requirements of 26 U.S.C. §6806 (c) for wagering tax registrants. Act of October 22, 1968, Pub. L. No. 90-618, Title II, §204, 82 Stat. 1235.

The requirement that each Internal Revenue office maintain a public listing of wagering tax registrants and to provide certified copies of the list to any state or local prosecuting office upon request (26 U.S.C. §6107) was also repealed in 1968, Act of October 22, 1968, Pub. L. No. 90-618, Title II, §203 (a), 82 Stat. 1235.

Finally in 1974 Congress enacted 26 U.S.C. §4424 which purports to protect dissemination of wagering tax registrant information but which includes exceptions allowing dissemination and provides no penalty for unauthorized distribution of information supplied by wagering tax registrants.

In the instant case the District Court has ruled that the statutory modifications delineated above were "sufficient to prevent the defendants from 'being confronted by substantial and real.....hazards of incrimination'" United States v O'Brien (Memorandum of Decision, September 29, 1976 D.C. Conn).

The opinion of the District Court concedes "...that only immunity from the use of wagering tax information in subsequent criminal prosecutions for gambling would afford defendants complete protection...." United States v O'Brien, supra at p6. However the Court found that the defendants produced no evidence of the use of wagering tax information in gambling prosecutions since 1974. Thus, the Court reasons, "the present statutory scheme is adequate to prevent a 'substantial and real hazard of incrimination'".

The mere fact of prosecutorial forbearance or that the realities of law enforcement has not produced gambling prosecutions based upon information learned from wagering tax stamp registrations and returns at this time does not assure that the information gleaned under the present statutory scheme will not be used in the future or at the present moment for that matter.

The present statutory scheme is not coextensive with the Fifth Amendment privilege against self incrimination and therefore does not comport with the holding in the Marchetti and Grosso cases.

B.

There is a real and appreciable risk of self incrimination in complying with the wagering tax provisions of the Internal Revenue Code notwithstanding the provisions of 26 U.S.C. §4424.

In this case the District Court held that the provisions of 26 U.S.C. §4424 adequately protected appellants from a "substantial and real hazard of incrimination".

Professor McCormick in his treatise on Evidence proposes that "...the now prevailing general judicial attitude (is) that almost any conceivable danger (of self incrimination) is 'real and appreciable'" §123 at 263 (2d ed. E. Cleary 1972). Professors Wright and Miller state that the privilege against self incrimination ".....is available even if the risk of criminal prosecution is remote." 8 Federal Practice and Procedure §2018 at 141 (1970).

Section 4424, which purports to prevent disclosure of information relating to wagering tax stamps, includes exceptions permitting disclosures which eventually could come to bear against a registrant in a criminal investigation and prosecution.

Subsection (a) of §4424 the "General Rule" forbidding disclosure of wagering tax information specifically circumscribes disclosure to "any person". The term "person" is defined differently and apart from the term "State" in 26 U.S.C. §7701, the section defining terms applicable to the Internal Revenue Code. Thus at least arguably the prohibitions on disclosure contained in §4424 do not apply to disclosure to states.

Subsection (b) of §4424 allows disclosure of wagering tax information to prosecute or investigate violations of the tax code both civil and criminal.

There is no provision to protect the wagering tax registrant from investigations which may indirectly result from the public nature of the criminal information or indictment or civil tax complaints which are based upon the registration and tax returns filed pursuant to the Code.

A defendant in a future criminal prosecution would have a difficult time indeed proving that the initial tip in the local or state investigation arose from a civil tax complaint on public file, and that the civil complaint was based upon information provided by the defendant himself years earlier as a registrant for wagering tax purposes.

At any rate the taint from the use of information protected by §4424 may become so attenuated that even should a connection be proven it may appear so remote as to render future Fifth Amendment claims useless.

Finally, subsection (d) of 26 U.S.C. §4424 allows inspection of wagering tax information by Committees of Congress. There can be no guarantee that information received by a congressional committee will remain confidential and there is no provision of §4424 which protects the integrity of the information from disclosure by the congresspersons or staff persons who view it.

In addition 26 U.S.C. §4424 does not provide any penalty for unauthorized dissemination of wagering tax information provided by registrants.

While the criticisms of §4424 are necessarily hypothetical, the questions posed are not "imaginary and insubstantial" possibilities of Fifth Amendment violations, Minor v United States, 396 U.S. 87, 98, 90 S.Ct. 284 (1969). Nor are the possible dangers of self incrimination "trifling" Marchetti v United States, supra at 53; nor are they "purely fantastic" deAntonio v Solomon, 42 FRD 320, 323 (D Mass 1973).

Section 4424 leaves a "substantial and real" hazard of self incrimination for the wagering tax registrant.

C.

Factors other than those contemplated by 26 U.S.C. §4424 create a real and appreciable risk of self incrimination.

It cannot be ignored that wagering tax information provided by a gambling stamp registrant may be forwarded by accident or covertly by design to the various agencies of the Federal government or to local and state prosecutors and police.

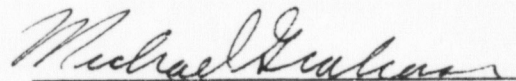
The modern law enforcement apparatus is large and interconnected at every level. The present statutory scheme does not and cannot eliminate every "real and substantial" possibility of self incrimination.

A provision immunizing gambling tax registrants from prosecution would meet the Marchetti and Grosso test the present law does not.

CONCLUSION

For the reasons stated above the decision of the District Court should be reversed.

Respectfully submitted,



Michael Graham
Attorney for Appellant
487 Main Street
Hartford, Connecticut 06103

APPENDIX

U.S. DISTRICT COURT
HARTFORD, CONN.

DISTRICT OF CONNECTICUT

v.

ANDREW LUPO

CRIMINAL NO.

44-76-73

INFORMATION

The United States Attorney charges:

COUNT ONE

That during the months of July, August, September, and November

_____, 1975 the defendant, ANDREW LUFO,

whose residence was in the District of Connecticut, did at a place of business in Hartford County, Connecticut, in the District of Connecticut, engage in the business of receiving and accepting wagers, as defined in Section 4421(1) and (2) of Title 26, United States Code, whereby he became liable for the special

occupational tax imposed by Section , Title 26, United States Code; that prior to engaging in said business he was required by Section 4401 of Title 26, United States Code, and applicable regulations, to pay the special occupational tax imposed by Section 4411 of Title 26, United States Code, to the District Director of Internal Revenue, Hartford, Connecticut, and that prior to engaging in said business he failed to pay said special occupational tax to the District Director, or to any other proper officer of the United States.

In violation of Section 7262, Internal Revenue Code; 26 United States Code, 7262.

I hereby certify that the foregoing
is a true copy of the original
document on file. Date: 5-17-76

John A. Martinez
Clerk
By: [Signature]
Deputy Clerk

UNITED STATES OF AMERICA

[Signature]
PETER C. DORSEY

United States Attorney

BY: Paul E. Coffey
PAUL E. COFFEY

Special Attorney

U.S. Department of Justice

CRIMINAL DOCKET - U.S. District Court

CHARGE PO	JUDGE/MAGISTRATE Assigned	U.S.	vs.	LUPO, ANDREW	Case Filed Mo. Day	MJB	76	73	1
CHARGE MO	05				5	14			
ANDOR Mis	205	2	Sp. Sentence		No. of Defs	0			
FLONY Fel				(LAST FIRST MIDDLE)	JUVENILE				

U.S. TITLE/SECTION

26:7262

OFFENSES CHARGED

failure to pay special occupational
tax to IRS prior to engaging in busi-
ness of receiving & accepting wagers

ORIGINAL COUNTS

1

U.S. MAG
CASE NO

BAIL • RELEASE

AMT	Fugitive
Set	Pers. Recog.
PSA	Conditions
Date	10% Deposit
Bail Not Made	Surety Bond
Status Changed	Collateral
(See Docket)	3rd Pmt. Cust. Other

II. KEY DATES & INTERVALS

ARREST or U.S. Custody Began	INDICTMENT Information <input checked="" type="checkbox"/> 5/14/76	ARRAIGNMENT 1st Plea 6/7/76 Final Plea 10/13/76	TRIAL Trial Set For Voor Dire <input type="checkbox"/> Trial Began <input type="checkbox"/> Trial Ended <input type="checkbox"/>	SENTENCE Disposition of Charges 10/13/76 10/13/76 <input checked="" type="checkbox"/> Convicted <input checked="" type="checkbox"/> On All Charges <input type="checkbox"/> Acquitted <input type="checkbox"/> On Lesser Offense(s) <input type="checkbox"/> Dismissed <input type="checkbox"/> WOP <input type="checkbox"/> WP <input type="checkbox"/> On Government's Motion
Summons Served	Indict. Waived <input type="checkbox"/>	Superseding Indict/info <input type="checkbox"/>	NG <input type="checkbox"/> G <input type="checkbox"/> NOL G Plea W/Drawn	
First Appearance	In Charging District		NG <input type="checkbox"/> G <input checked="" type="checkbox"/> NOL	

Search Warrant	Issued	DATE	INITIAL/NO	INITIAL APPEARANCE DATE	INITIAL/NO	OUTCOME
Summons	Issued			PRELIMINARY EXAMINATION		
Arrest Warrant Issued	Served			OR		
COMPLAINT				REMOVAL HEARING		
OFFENSE (In Complaint)				WAIVED <input type="checkbox"/> NOT WAIVED <input type="checkbox"/>	Tape Number	
				INTERVENING INDICTMENT		

U.S. Attorney or Agent

Peter C. Dorsey, US Atty.
Paul E. Coffey, Sp. Atty.

ATTORNEYS

Michael Graham
487 Main St.
Hartford, Conn. 06103

* Show last names and suffix numbers of other defendants on same indictment information

DATE	(DOCUMENT NO.)	PROCEEDINGS	EXCLUDABLE DELAY
			(a) (b) (c) (d)
1976			
5/14		Information, filed.	
5/17		Summons issued and handed US Marshal.	
5/17		Motion to Remand to U.S. Magistrate for Trial Under Rule 9(d), F.R.Cr.P., filed.	
5/25		Marshal's executed return, filed. (Summons)	
6/3		CJA 23, Financial Affidavit with Endorsement thereon, "Approved" (Blumenfeld, J.) M. 6-4-76.	
6/4		CJA 20 executed (Templeton, D.C.) appointing Michael Graham to represent Deft.	
6/7		Appearance of Michael Graham, filed. PLEA of not guilty entered to all counts. (Blumenfeld, J.)	
6/11		Request of U.S. to Withdraw Motion to Remand, filed.	
6/24		Notice of Readiness, filed by Govt.	
6/24		CJA 20 executed (Blumenfeld, J.) M. 6-4-76 See Cr. H-75-73.	
6/30		Court Reporter's notes of Proceedings held on June 7, 1976, filed in Hfd. (Collard, R.)	
7/12		Court Reporter's Sound Recording of Proceedings held on June 7, 1976, filed in Hartford. (Collard, R.)	
8/24		JURY ASSG. LIST - Over to September 14, 1976. (Blumenfeld, J.)	

OPPOSITE THE APPLICABLE DOCKET ENTRIES SHOW IN SECTION V ANY OCCURRENCE OF EXCLUDABLE DELAY PER 18 USC § 3161(b)

Crim. H-76-73		USA vs. Andrew Lupo		V. EXCLUDABLE DELAY			
DATE	DOCUMENT NO.	IV. PROCEEDINGS (CONTINUED)	EXCLUDABLE DELAY	Interval (a)	Start Date End Date (b)	LT Code (c)	Total Days (d)
1976							
10/13		Motion to Dismiss Information and Memorandum in Support of Deft's. Motion to Dismiss Information, filed.					
10/13		CHANGE OF PLEA to <u>nolo contendere</u> entered to count #1. Court enters finding of guilty on plea. Court denies Deft's. pending Motion to Dismiss. Deft. reserves right to appeal constitutional issue with Court approval.					
		DISPOSITION - \$1000.00 committed fine. Execution on payment of fine stayed pending appeal and for a period of 10 days after this Court's receipt of the Mandate from the Second Circuit Court of Appeals. (Blumenfeld, J.)					
10/13		Judgment Order, filed. (Blumenfeld, J.) M.10-13-76.					
10/19		CJA 20 executed (Blumenfeld, J.) and mailed to A.O. for payment.					
10/22		Notice of Appeal, Motion For Assignment of Counsel and Granting Leave to Appeal in Forma Pauperis and Motion to Continue Representation By Special Public Defender, filed. Copies of Notice of Appeal sent to Atty. Graham and Coffey. Certified copies of Notice of Appeal and docket entries sent to USCA.					
10/22		Endorsement entered and filed on Motion For Assignment of Counsel and Granting Leave to Appeal in Forma Pauperis, "Motion granted. 10-22-76." Blumenfeld, J.) M.10-22-76. Copies sent to counsel of record.					
11/1		Acknowledgment from USCA on documents mailed on 10/22/76, filed.					

FINE AND RESTITUTION PAYMENTS					
DATE	RECEIPT NUMBER	C.D. NUMBER	DATE	RECEIPT NUMBER	C.D. NUMBER

B

United States of America vs.

United States District Court for

ANDREW LUPO

DISTRICT OF CONNECTICUT

DEFENDANT

BEST COPY AVAILABLE

DOCKET NO. Criminal N-76-73

In the presence of the attorney for the government
the defendant appeared in person on this date

MONTH DAY YEAR

October 13, 1976

WITHOUT COUNSEL

However the court advised defendant of right to counsel and asked whether defendant desired to have counsel appointed by the court and the defendant thereupon waived assistance of counsel.

WITH COUNSEL

Michael Graham, Esq.

(Name of counsel)

PLEA

☐ GUILTY, and the court being satisfied that
there is a factual basis for the plea,

☒ NOLO CONTENDERE,

☐ NOT GUILTY

There being a finding/verdict of

☐ NOT GUILTY. Defendant is discharged

☒ GUILTY, by the Court.

Defendant has been convicted as charged of the offense(s) of violation of Title 26, United States Code, Section 7262 (prior to engaging in business of receiving and accepting wagers, failed to pay special occupational tax to the Internal Revenue Service) as charged in one count.

The court asked whether defendant had anything to say why judgment should not be pronounced. If cause no sufficient cause to the contrary was shown or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby sentenced to a term of imprisonment of one year and one day, to be served in the Federal Reformatory for Women at Alderson, West Virginia, or in any other Federal institution, or to pay a fine of one thousand dollars (\$1000.00). Defendant is to stand committed until payment of fine or until he is otherwise discharged as provided by law. Execution on payment of fine is hereby stayed pending appeal and for a period of ten (10) days after this Court's receipt of the mandate from the Second Circuit Court of Appeals.

ENTERED
ON
RECEIPT
ORDER

RECEIVED
FEDERAL BUREAU OF INVESTIGATION
U.S. DEPARTMENT OF JUSTICE
WASHINGTON, D.C. 20535

RECEIVED
FEDERAL BUREAU OF INVESTIGATION
U.S. DEPARTMENT OF JUSTICE
WASHINGTON, D.C. 20535

In addition to the special conditions of probation imposed above, it is hereby ordered that the general conditions of probation set out in the body of this judgment be imposed. The Court may change the conditions of probation, remove or extend the period of probation, and at any time during the probation period or within a maximum probation period of five years permitted by law, may cause a warrant and revoke probation for a violation occurring during the probation period.

The Court orders commitment to the custody of the Attorney General and recommends,

It is ordered that the Clerk deliver a certified copy of this judgment and commitment to the U.S. Marshal or other qualified officer.

CERTIFIED AS A TRUE COPY ON

THIS DATE 10-13-76

BY [Signature]

() CLERK

() DEPUTY

WITNESSED BY

() U.S. District Judge

() U.S. Marshal

H. Joseph Blumenfeld

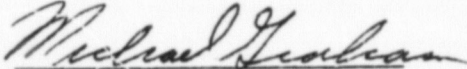
H. Joseph Blumenfeld

Date

10-13-76

CERTIFICATION

This is to certify that a copy of the foregoing has been mailed, postage prepaid, on this 14th day of December, 1976 at Hartford, to the United States Attorney, 450 Main Street, Hartford, Connecticut 06103.


Michael Graham